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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1048

HARRY G. SILVERSTEIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the order of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. 29a)* is officially

*Parenthetical references are to the Appendix in the Court of Appeals.

reported at 210 F. Supp. 401 (S.D.N.Y. 1962). The opinion of the United States Court of Appeals for the Second Circuit, decided March 12, 1963, has not yet been officially reported, but is reproduced in the appendix beginning at page 1a.

Jurisdiction

The appeal to the United States Court of Appeals for the Second Circuit was decided March 12, 1963. By stipulation of the parties and by order of the Court below the mandate thereon to be issued to the United States District Court for the Southern District of New York was stayed provided that the petitioner herein file with this Court and serve a petition for a writ of certiorari on or before the 25th day of April, 1963. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Sec. 1254(1).

Questions Presented

1. May the United States government, in conducting a criminal tax investigation of a general partner, compel him, in derogation of his Constitutional privilege against self-incrimination, to produce books and records, which he owns as a general partner, of a limited partnership in which he, his son and son-in-law are the sole general partners?

2. Is a general partner of a limited partnership deprived of his privilege against self-incrimination merely because he shares an economic interest with his partners?

3(a) May an accused be compelled to produce incriminating documents over his claim of Constitutional privilege because all or part of the subject matter of the documents is, or may become, known to others?

3(b) Does the Constitutional privilege against self-incrimination apply only to documents which are secret?

3(c) Does the basis and, therefore, the scope of the privilege against self-incrimination differ from those privileges based on the nature of a relationship between two persons, which privileges apply only to confidential communications between them?

3(d) Does the fact that limited partners have a limited access to partnership documents and records remove such documents from the scope of a general partner's Constitutional privilege against self-incrimination?

4. Is a limited partnership so corporate-like in nature that its records should be excluded from the scope of the Fifth Amendment asserted by a general partner?

Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, arising out of an affirmance by that Court of an order of the United States District Court for the Southern District of New York granting the application and motion of the United States for an order requiring a general partner of a limited partnership to produce partnership books and records over his Constitutional objection, and pursuant to an Internal Revenue Service summons issued by a Special Agent under the authority of Section 7602, Internal Revenue Code 1954.

Petitioner, Harry G. Silverstein, hereinafter referred to as "Silverstein," is a general partner, together with his son, Larry A. Silverstein, and his son-in-law, Bernard H. Mendik, in five limited partnerships formed pursuant to Article 8 of the New York State Partnership Law (App. 19a).

The relationship between Harry G. Silverstein and the partnerships is a highly personal one (App. 20a, 28a).

The operations of the partnerships in question are controlled solely by him, his son and his son-in-law (App. 20a). Their powers as general partners are purely personal to them. No other persons may be substituted as general partners (App. 20a). The very existence of the partnerships depends upon the general partners as individuals since the death, insanity, retirement or bankruptcy of any of them will dissolve the partnerships (App. 20a). Only the general partners are personally liable for all partnership debts and obligations without any limitation thereon. The general partners alone have the absolute right to determine who may join the partnership (App. 20a).

The summons here in question, encaptioned in the matter of the personal tax liabilities of the petitioner, his son, and son-in-law and their respective spouses, and subscribed by a Special Agent of the Internal Revenue Service, is directed to the petitioner individually and seeks the production of personal records of a partnership of which he, his son and son-in-law are the sole general partners. It is now Hornbook law that the function of a Special Agent of the Internal Revenue Service is to gather evidence to support a criminal prosecution, and the Court below so held.

The Court below stated that it found the present question difficult. It further stated that the Supreme Court has never had before it the significant problem here posed, and that no clear or consistent approach emerges from the decisions of the various Federal Courts. Indeed, the Court below admitted that the Supreme Court's only decision dealing with an assertion of the privilege against self-incrimination with reference to partnership records upheld the assertion of the partnership privilege. *Boyd* v. *United States*, 116 U. S. 616 (1886).

This case squarely presents a fundamental question regarding the scope of the privilege against self-incrimina-

tion, i.e., whether a sharing of economic interest with another person or persons necessarily removes the books pertaining to the shared interest from the protection of the privilege. It also presents the fundamental question of whether records, with respect to which the privilege is claimed, must be secret. The opinion of the Court below in effect answers these questions affirmatively, stating as the basis of its decision that the partnership here in question did not "represent the *purely* private or personal interests" of petitioner. *United States* v. *White*, 322 U. S. 694 (1944), App. 5a (emphasis supplied). This would leave the privilege available only with respect to the books of *some* sole proprietors. Even in such instances, the existence of an economic interest in a creditor or creditors of the sole proprietors who are entitled to inspect books might be deemed to deprive even those books of the degree of "pure" privacy or exclusiveness which the Court below erroneously holds to be a prerequisite for asserting the privilege. In view of the continuing trend toward interdependence of modern business entities, the decision below reduces the area of operation of the privilege almost to the vanishing point.

The Court below erred in applying the test stated in *United States* v. *White*, 322 U. S. 694 (1944), applicable only in purely representative or custodial situations. The Court below explicitly recognized that the instant situation presents the "intermediate" case of coexisting personal and representative interests App. 3a. Neither the *White* case, nor any other opinion of this Court has explicitly discussed this question. The decision below makes a unique determination of Constitutional law which should be settled by this Court.

Petitioner submits that the decisions below unduly and unlawfully restrict the scope of the privilege against self-incrimination and that such a decision is, therefore, contrary to well established principles of Consfitutional Law.

Hoffman v. *United States*, 341 U. S. 479, 486, 487 (1951); *Maffie* v. *United States*, 209 F. 2d 225, 227 (1st Cir. 1954); *Application of House*, 144 F. Supp. 95 (N. D. Cal. 1956).

Accordingly, petitioner seeks reversal of the order of the United States District Court for the Southern District of New York, dated November 5, 1962, and direction of the entry of an order by that Court declaring that the Internal Revenue Service summons here in question violates the petitioner's Constitutional privilege against self-incrimination and that enforcement of said summons be permanently stayed and enjoined.

POINT I

As a general partner, petitioner is entitled to assert his Constitutional privilege against self-incrimination with respect to partnership documents.

The decision below was contrary to the weight of authority that the Constitutional privilege against self-incrimination covers partnership records. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Layman* v. *Webb*, 350 P. 2d 323, 325 (Okla. Cr. 1960); *United States* v. *Linen Service Council of N. J.*, 141 F. Supp. 511 (D.N.J. 1956); *United States* v. *Lawn*, 115 F. Supp. 674, 677 (S.D.N.Y. 1953); *United States* v. *Brasley*, 268 Fed. 59 (W. D. Pa. 1920); see also, *United States* v. *Achilli*, 234 F. 2d 797, 806 (7th Cir. 1956); 98 C.J.S. § 448, page 285.

The theory behind the applicability of the privilege to a partnership is stated in 10 Mertens, *Law of Federal Income Taxation*, page 72, § 55A.21 (1958 Callaghan & Co.): "The privilege against self-incrimination is available as to partnership records for they are personal." It is clearly implied in the above decisions that the privilege against self-incrimination with respect to partnership documents may be asserted even though the interest of a general partner in a partnership asset is shared with others.

The dissenting opinion of Judge Biggs for the Court of Appeals in *United States* v. *White*, 137 F. 2d 24, 26 (3d Cir. 1943), adopted by this Court in its reversal of the majority of the Court of Appeals, *United States* v. *White*, 322 U. S. 694 (1944), shows the essential logic of the development of this rule. Unions and other organizations of the type mentioned in *White* are different from the partnership now before this Court, and for that reason are treated differently. Judge Biggs stated:

> "A member of a partnership may maintain the privilege against self-incrimination in respect to the production of the records of the partnership. The right to choose one's fellow members, the delectus personarum, which is regarded as one of the most important and indispensable characteristics of a partnership, is not available to the members of a labor union. Generally a worker may be admitted to a labor union without the consent of all the members . . . and a member may not be expelled from the union so long as he meets its membership requirements . . ."
>
> "Unlike the members of a partnership the members of a union do not act as agents for each other or assume responsibility for the conduct of the other members. Consequently in fact there can be no claim of personal ownership or privity by the members of a union in the records of the organization. The books and records of a labor union are no more the personal property of the individual members than are the funds in a union treasury the private and personal funds of the members." (Citations omitted.) 137 F. 2d at 27, 28.

In a series of decisions subsequent to *Boyd* v. *United States*, *supra*, this Court has held that a claim of a person asserting a Constitutional privilege as to various documents will be overruled only where that person holds

the records in a purely representative or custodial capacity. *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Wilson* v. *United States*, 221 U. S. 361 (1911).

The Court below erroneously relied on the decision in the *White* case although the Supreme Court there was not dealing with the "intermediate" situation, but on the contrary expressly stated:

> "Our attention is directed solely to the right of an officer of a union to claim the privilege . . ." 322 U. S. at 698

This Court's express holding applied not to the "intermediate" case, but rather to:

> ". . . unions, religious bodies, trade associations, social clubs . . ." 322 U. S. at 697

Thus this Court was addressing itself to the situations where the books were held *only* in a representative capacity. The capacity in which the petitioner holds the records here in question is personal, as opposed to the mere representative capacity present in the *White* case. This Court stated in *United States* v. *White*, at 322 U. S. 701, that the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Here the privilege is rather being asserted by the petitioner solely in his personal capacity and not on behalf of the partnership.

General partners of a limited partnership act in their own interest and not merely in a representative capacity for other persons having a limited investment and a limited liability. In *Glendsder Textile Co.*, 46 B.T.A. 176, 185 (1942), the Court stated:

> "They [the general partners] were acting in their own interest as hitherto, which constituted five-twelfths of the partnership, and not merely in a representative capacity for a body of persons having a limited in-

> vestment and a limited liability. Nor were the limited partners here able to remove the general partners and control them as agents, as stockholders may control directors. The general partners under powers reserved by the certificates might increase the limited partners, to obtain new money, but the latter, unlike new stockholders in a corporation, acquire no share in control." 46 B.T.A. at 185 (Brackets supplied)

The petitioner's personal relationship to the partnership was not deprived of its personal quality merely because other persons held a passive economic interest in the same organization. That the petitioner may be said, in some sense or to some extent, to have acted as representative of the limited partners does not remove the foundation for upholding the privilege. If the reasoning below were correct, the ownership of one partner in a two-man partnership could be dismissed as an interest in common because of the co-existence of the interest of the other partner. Thus, the privilege would be denied to *any* partner contrary to law. Similarly would the privilege be denied to an individual whose business creditors, in order to protect their interest, obtained the right to inspect their debtor's financial records.

Wherever the claim of privilege has been overruled, the Court has always found that the records were not held, to *any* extent, in a personal capacity by the person asserting the privilege. The history, purpose and language of the Fifth Amendment is too unambiguous for a contrary conclusion. Where personal capacity exists, the fact that some representative capacity is also claimed to exist furnishes no basis for denying the privilege. Until the decision of the Court below, wherever the privilege has been overruled, the capacity has been *purely* representative.

That analysis is clear with respect to corporations. *Hale* v. *Henkel*, *supra*; *Wilson* v. *United States*, *supra*;

Application of Daniels, 140 F. Supp. 322 (S.D.N.Y. 1956). It is equally clear with respect to unions, trade associations and organizations of that type. *United States v. White*, *supra*. In the *White* case, this Court stated the test to be whether the organization embodied a "... common or group interest *only*" (Emphasis supplied). 322 U. S. at 701. In *United States v. Field*, 193 F. 2d 109, 111 (2nd Cir. 1951), the Court of Appeals for the Second Circuit based on its denial of a claim of privilege upon the ground that the papers were there held "*merely* in a 'representative capacity'" (Emphasis supplied).

Since petitioner's interest in the partnerships and their documents is a personal one, the decision below was in error in denying him his Constitutional privilege against self-incrimination as to said documents.

POINT II

The New York State Partnership Law regulating limited partnerships contains no requirements that such an entity be treated differently from a general partnership for the purposes of the privilege against self-incrimination.

The Court below, to justify the denial of the Constitutional privilege against self-incrimination to a general partner, erroneously categorized the limited partnerships here involved as creatures of the State analogous to corporations. The holding of the Court below to the effect that the choice of a limited partnership "was necessarily an election to submit to a greater degree of governmental intervention" is not only contrary to the facts of the instant proceeding, but is without any support whatsoever in either the case law or the statutory enactments. In apparent support of this extreme position, the Court below relied on §§ 90 and 91 of the New York Partnership Law, requiring the filing of a certificate of limited partner-

ship. It is significant that § 81 of the New York Partnership Law, applicable to general partnerships, has a nearly identical provision. And yet, the Court below did not state the logical conclusion of this novel "governmental intervention" theory, to wit: that it applies also to any general partnership which is similarly regulated by statute. The scope and consequences of this theory are even more drastic when considered in light of New York State Penal Law, § 440, which also requires the filing of a certificate with respect to operation of a business under an assumed or trade name, whether it be a corporate, partnership or sole proprietorship type of entity. The doctrine, therefore, serves effectively to deny the privilege against self-incrimination to virtually every and any type of business organization.

Contrary to the opinion below, the select statutory characteristic of a limited partnership has no bearing on the issue here. That characteristic accorded a limited partnership is the freedom of limited partners from personal liability for partnership debts. But this did not alter the fact that the *general* partners continue to be personally liable for all partnership debts. The petitioner here is a *general* partner.

If the rationale underlying the denial of the privilege to unincorporated public organizations is the government's need to regulate such organizations (*United States* v. *White*, *supra*), that need is not here present since the only governmental regulation being carried on is that of the petitioner personally. Where records of an unincorporated public organization have been required to be produced, the governmental regulation activity was directed at the unincorporated public organization and not the individual in his personal capacity. *McPhaul* v. *United States*, 364 U. S. 372 (1960); *Rogers* v. *United States*, 340 U. S. 367 (1951); *United States* v. *Fleischman*, 339 U. S. 349 (1950), all relied on by the Court below; *United States* v. *Dodd*, 193 F. 2d 109 (2d Cir. 1951).

Under the very terms of the New York State Statute (N. Y. Part. L. §§ 51, 98), the books of a limited partnership are the property of the general partners. *People* v. *Phillips*, 207 Misc. 205, 137 N.Y.S. 2d 697 (Kings 1955). The limited partners have no such property right. *Alley* v. *Clark*, 71 F. Supp. 521 (E.D.N.Y. 1947); *Skolny* v. *Richter*, 139 App. Div. 534, 124 N. Y. S. App. 152, 157 (1st Dept. 1910). Thus nothing in the State law impairs the personal capacity in which petitioner, as general partner, holds the records. Since an owner or general partner is clearly not a mere custodian, the Court's characterization of the petitioner as holding the books and records "in common" with others was error.

POINT III

The limited partnerships here in question are not quasi-corporate in character.

The decision of the Court below erroneously holds that the partnerships here in question have a quasi-corporate character. Treasury regulations exist establishing criteria useful in determining whether a business organization is an association similar in substance to that of a corporation.

The aforesaid regulations set forth the controlling criteria for determining whether a business organization resembles a corporation sufficiently to be treated as such. Reg. 301.7701-2(a)(2) states that whether an organization is to be treated as a partnership or a corporation depends on the presence of the following corporate attributes:

1) Centralized management;

2) Continuity of life;

3) Free transferability of interests; and

4) Limited liability.

The subject partnerships do not have continuity of life. The record shows that if any one of the general partners in any of the partnerships should retire, become insane, die or become bankrupt, the partnerships will be dissolved (App. 20a). Treasury Reg. § 301.7701-2(b)(1) states that where death, insanity, bankruptcy or retirement of any member causes a dissolution of a partnership, the characteristic of corporate continuity of life does not exist. Reg. § 301.7701-2(b)(1) further explicitly provides with respect to a *limited partnership*, such as in the case at bar, that no continuity of life exists if retirement, death or insanity of a general partner effects a dissolution, but the remaining partners have the right to continue the partnership. *Glendale Textile Co. v. C.I.R.*, 46 BTA 176 (1942).

The limited partnerships lack "limited liability." Under the regulations, limited liability exists only if there is *no* member of the partnership who is personally liable for debts of the partnership. Reg. § 301.7701-2(d). The record summarily disposes of this contention since petitioner and his co-general partners are so liable (App. 20a).

The limited partnerships lack "free transferability of interests". According to the regulations, the corporate characteristic of free transferability exists only if each member has the power, without the consent of other members, to substitute for themselves in the organization a new person not a member of the organization. Reg. § 301.7701-2(e)(1). Again, the record shows this is not the case here (App. 20a, 26a).

Pursuant to Reg. § 301.7701-2(a)(3) an organization, to be corporately labelled, must have more corporate than non-corporate characteristics. Thus, even if centralized management were found to exist in the corporate sense, the non-corporate characteristics of the instant partnerships would out-weigh corporate characteristics in the ratio of three to one. Under the Treasury's own regulations, therefore, petitioner must prevail.

Accordingly, the Court below was in error in relying on the theory of corporate resemblance in denying the petitioner his Constitutional rights under the Fifth Amendment.

POINT IV

The Constitutional privilege against self-incrimination does not require that documents, as to which the privilege is asserted, be confidential.

The reliance of the Court below on the fact that limited partners have a right to inspect partnership books, pursuant to § 99 of the New York Partnership Law, as a basis for denying the petitioner's Constitutional privilege against self-incrimination, was error.

In the first place, there is nothing in the record to show that any limited partner has ever seen any of these records. Even if one had, the history and background of the privilege against self-incrimination clearly reveal that its purpose was to protect against any forced disclosure from the mouth of the accused, regardless of whether the information was otherwise available. The privilege does not have a prerequisite of secrecy or non-availability to others. Its sole rationale is rather that the individual should not be required to jeopardize himself by his own coerced actions with respect either to testimony or to production of books, records, documents, etc. *Maffie* v. *United States*, 209 F. 2d 225, 227 (1st Cir. 1954); *Griswold, The Fifth Amendment today*, Part I (Harvard University Press, 1955; 8 Wigmore, *Evidence*, § 2251 (McNaughton rev. 1961).

The history and rationale of the privilege against self-incrimination differs in this respect from other privileges, which are based on the confidential nature of a unique relationship. Thus, the nature of the attorney-client and doctor-patient privileges presupposes that only the attorney and client, or doctor and patient, are privy to the

communication. The function and purpose of these doctrines is to foster free disclosure in a confidential relationship. What is privileged there is the confidential communication. If other persons are privy to the communication, then it follows that no confidential relationship was intended and hence the *raison d'être* for the privilege falls. The claim of privilege under the Fifth Amendment, on the other hand, presupposes no confidential relation or communication as its subject matter. Its sole object is to prevent forced self-disclosure, regardless of whether the information be known or whether the documents be available as a matter of law or otherwise to persons other than the one asserting the Constitutional privilege.

The proposition is self-evident. The existence of a right on the part of others to examine books does not overturn the privilege. The privilege only has meaning and existence in the face of a right of inspection under the law. Therefore, the mere right of a limited partner to inspect books is not a basis to overrule the assertion of the privilege.

Under §6063 of the Internal Revenue Code of 1954, original tax returns are made public records subject, under certain circumstances, to a right to inspection. However, despite a lack of secrecy and the existence of public availability with respect to such documents, it has never been suggested that a taxpayer may be compelled to produce his own retained copies of tax returns over a proper claim of Constitutional privilege. *Internal Revenue Agent v. Sullivan*, 287 Fed. 138 (W.D.N.Y. 1923).

Access to the books and records in question by the limited partners does not vitiate an assertion of the Fifth Amendment privilege by the petitioner. The Supreme Court has upheld the privilege where access to records was available to others by law. *Matter of Harris*, 221 U. S. 274 (1910).

CONCLUSION

For the reasons stated, the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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